No. 20193

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S.A.,
Appellant-Defendant and Third Party Plaintiff,

vs.

BERNARD A. NORIEGA,
Appellee-Plaintiff,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation,
Appellant-Third Party Defendant.

OPENING BRIEF OF APPELLANT CRESCENT WHARF & WAREHOUSE COMPANY.

SIKES, PINNEY AND MATTHEW,
3424 Wilshire Boulevard,
Los Angeles, Calif. 90005,
Attorneys for Crescent Wharf & Warehouse Company, a corporation, Appellant-Third Party Defendant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 20193

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S.A.,
Appellant-Defendant and Third Party Plaintiff,

vs.

BERNARD A. NORIEGA,
Appellee-Plaintiff,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation,
Appellant-Third Party Defendant.

OPENING BRIEF OF APPELLANT CRESCENT WHARF & WAREHOUSE COMPANY.

Jurisdiction and Background.

The action was brought by Bernard A. Noriega, the appellee-plaintiff, for personal injuries received while he was working as a longshoreman against appellant Compania Naviera De Baja California, S.A., a corporation, hereinafter called "Compania." Noriega was an employee of Crescent Wharf & Warehouse Company, a corporation, appellant-third party defendant, hereinafter referred to as "Stevedore Company," at the time of his injury on board the "SAN LUCIANO" on April 18, 1963. The action, being based on maritime tort, is

within the admiralty and maritime jurisdiction of the District Court of the United States (28 United States Code Sec. 1333), the plaintiff Noriega having brought his action on the civil side of the United States District Court under 28 United States Code Sec. 1332. Compania answered the complaint and brought a third party complaint against the Stevedore Company seeking indemnity over. The Stevedore Company answered the third party complaint setting up a special defense [R. p. 23] of a failure on the part of Compania to have used ordinary care to provide a vessel, gear and equipment in such a condition that the Stevedore Company would be able to load the vessel with reasonable safety. The matter was tried without a jury and the District Court ordered judgment in favor of the plaintiff Noriega against Compania in the amount of $50,516.90 with interest together with costs [R. p. 52] and the Court concluded that Compania was entitled to recover from the Stevedore Company indemnity in said sum plus $2,000.00 attorneys fees and costs [R. 55]. Notice of Appeal was given by the Stevedore Company on March 10, 1965 [R. 59] insofar as the indemnity judgment was concerned.

Statement of the Case.

On April 18, 1963 the Stevedore Company employees were on board the "SAN LUCIANO" for the purpose of loading bricks [Tr. p. 19, lines 14-16] and the plaintiff Noriega was on board as an employee of the Stevedore Company [Tr. p. 19, lines 12-13]. The hold in which the bricks were being loaded was divided by a fore and aft bulkhead [Tr. p. 22, lines 17-19] and the hatch opening through which the pallets loaded with bricks were being brought on board was about six feet by ten

feet [Tr. p. 23, lines 1-10]. There was a shaft alley in the hold and it was necessary with the narrow opening to swing the load somewhat in order to miss the shaft alley [Tr. p. 24, lines 1-12] and in order to get the loads in, the gear had to come in contact with a flange [Tr. p. 81, lines 5-19]. If the load were allowed to come directly down through the hatch opening it would hit the shaft alley so that it was necessary and unavoidable that the yard fall would rub against the edges of the coaming on the 'tween deck hatch, and the only manner in which the load could have been brought in without capsizing and hitting the shaft alley was the method being used by the longshoremen [Tr. p. 58, lines 2-7] and such was the only practical way in which the work could be done [Tr. p. 68, line 10, to p. 69, line 5]. The flange had no function or use on board the vessel [Tr. p. 3, lines 8-12]. The morning of the accident there had been three or four loads hung up on the flange [Tr. p. 53, lines 22-25] resulting in bricks falling from the pallet boards [Tr. p. 27, lines 18-25]. The Stevedore Company boss, Hansen, stopped the work and went to the first mate of the vessel, brought him back to the hatch, showed him the danger and told him that the loads were hanging up and that it had to be corrected [Tr. p. 59, lines 3-20; p. 58, lines 13-16]. The first mate (chief mate) had the crew members take a sledgehammer and they apparently repaired the situation [Tr. p. 59, lines 22-23; p. 60, lines 6-8]. All of the persons involved in the repair work were members of the ship's crew acting under the orders of the first mate [Tr. p. 73, lines 16-24]. After the crew members hammered the flange back flush with the coaming they stated in Spanish that it was "all right" or "all ready" [Tr. p. 43, line 12, to p. 44, line 5] and it appeared both to the first mate of

the vessel and to the Stevedore Company boss that the flange was safe [Tr. p. 65, lines 1-11]. The Stevedore Company boss looked at the flange after it was hammered back in and checked for any cracks. None was seen [Tr. p. 65, lines 12-17]. It did not appear to the Stevedore Company boss that there was any weld broken in the flange [Tr. p. 62, lines 9-17] and the flange appeared to be safe [Tr. p. 73, line 25, to p. 74, line 4]. When the crew had apparently rectified the situation there was no indication to the Stevedore Company boss that the flange had been loosened, since it was both welded and bolted to the coaming [Tr. p. 62, lines 9-12]. It was just the top part of the flange which had been loose, as the rest was permanently affixed to the coaming [Tr. p. 64, lines 11-14]. When the plaintiff was struck, he was struck only with the top part of the flange, the rest of the flange having to be chiseled off by the crew after the accident [Tr. p. 62, line 18, to p. 63, line 17; p. 64, lines 5-14]. The work resumed after the delay to repair the condition and another five or six loads were brought in before the injury to the plaintiff [Tr. p. 65, lines 18-22]. There was no load that hung up at the time the flange came loose [Tr. p. 66, lines 8-9; p. 81, lines 15-19; p. 81, line 24, to p. 82, line 4 p. 82, lines 19-22]. There was nothing on the gear which caught the flange at the time of the accident as the only contact was the usual one of dragging and rubbing the blacksmith and the wires across the coaming [Tr. p. 82, lines 5-8; p. 84, lines 6-11] and the flange was still flush with the coaming [Tr. p. 67, line 24]. No bricks fell at the time of the accident, there appeared to be nothing wrong with the load and there was no mishap of any kind insofar as the load was concerned at the time of the accident [Tr. p. 84, lines 12-23].

Specification of Errors Relied Upon by Third Party Defendant Crescent Wharf and Warehouse Company, Appellant.

Appellant Stevedore Company urges the errors specified as follows:

1. That the Court erred in finding [Find. of Fact 5; R. p. 53] that the Stevedore Company *negligently* allowed the gear to strike a metal flange on the vessel.

2. That the Court erred in finding [Find. of Fact 8; R. p. 54] that the loading gear struck or caught the flange causing a part of it to break off and strike the plaintiff.

3. That the Court erred in finding [Find. of Fact 11; R. pp. 54-55] that the Stevedore Company was negligent and had breached its duty to do its stevedoring services in a workmanlike manner by causing or permitting the loading gear to strike or to catch on the said flange and by failing to properly supervise the loading operations and by failing to conduct the loading in such a manner as to avoid unnecessary risks to the plaintiff and that such negligence and breach of warranty caused the unseaworthiness of the vessel and were the proximate causes of the injury to the plaintiff.

4. That the Court erred in finding [Find. of Fact 11; R. p. 55] in effect that it was not true that the shipowner Compania breached its obligations to the Stevedore Company to have the vessel and its gear and equipment in such a condition that the Stevedore Company by the use of ordinary care would be able to load the vessel with reasonable safety (this is the second and separate defense in the Stevedore Company's answer at page 23 of the Record).

ARGUMENT.

There was no material conflict in the evidence at the trial and accordingly it would appear fortunate that this appeal will be purely a matter of law based on uncontradicted evidence rather than on the weighing of any conflicting evidence.

The burden of proof on the indemnity action contained in the third party complaint is on the shipowner Compania as against the Stevedore Company, Crescent Wharf & Warehouse Company. The shipowner must prove the following, in order to recover indemnity:

1. *That the stevedoring company breached its implied contractual obligation to do its work with reasonable safety; and*

2. *That the shipowner did not breach its implied contractual obligation to exercise ordinary care to put the vessel, its gear and equipment in such a condition that an experienced stevedoring company would be able by the use of ordinary care to load cargo with reasonable safety to persons.*

Each of the above will be discussed separately as follows:

1. Did the Stevedore Company Breach Its Implied Contractual Obligation?

First of all, the stevedore company's obligation is not to do its work in an *absolutely safe manner*, the only obligation it has is to do its work with *"reasonable safety."* This obligation is clearly set out by the United States Supreme Court in the case of *Ryan Stevedore Company v. Pan-Atlantic Steamship Company*, 350 U.S. 124 at pages 131 and 132;

> "The third party complaint is grounded upon the contractor's breach of its purely consensual obligation owing to the shipowner to stow the cargo *in a reasonably safe manner*." (emphasis added).

This language was construed again by the United States Supreme Court in the case of *Weyerhaeuser Steamship Company v. Nacirema Operating Company*, 355 U.S. 563 at 565, as being a contractual undertaking to perform *with reasonable safety*.

Because of the very definition of the stevedore company's implied obligation as one of reasonable safety, we must look to the conditions as they appeared to the Stevedore Company personnel at the time of the injury in order to determine whether their conduct was reasonably safe under the circumstances. To analyze the circumstances, it must be noted that there was no evidence whatsoever in the entire record which would indicate that there was any other way, manner or method in which the Stevedoring Company could have loaded this cargo (thus complying with its contractual obligation to load the vessel) other than the way in which it was being done by the Stevedore Company at the time involved. Neither the plaintiff nor the shipowner produced any evidence whatsoever to the contrary in spite of the shipowner's burden of proof to show a breach of contract on the part of the Stevedore Company. It was testified to without contradiction that there was a shaft alley in the hatch involved, that the loads of brick had to be brought through a small hatch opening which was a part of the permanent structure of the vessel; and that in having to come down with the loads through the narrow hatch and to avoid spilling the brick by hitting the shaft alley, the loads had to go to one side which, of

course, would cause the cargo gear to rub on the hatch coaming where the useless flanges were located. The Stevedore Company boss Hansen stopped work when he saw that the flange, having protruded, presented a dangerous situation. He requested the first mate to have it fixed. The first mate undertook the responsibility, through the ship's personnel, to rectify the situation and although the flange appeared, thereafter, to be safe both to the ship's personnel and to the stevedore personnel, in fact the first mate did not rectify the situation, in that the flange itself had, apparently by the hammering, been made weak or broken so that it sprang or fell off, as different from the previous difficulty they had had of the loads catching and spilling brick.

With regard to the catching of loads, the flange, after the repair, was in fact safe as no load thereafter hung up. The load which was being brought in at the time the flange either sprang loose or fell did not catch up on the flange and the winchdriver who was actually handling the load states that there was nothing wrong with the load in the way it came into the hatch and that he knew of nothing that was out of the usual until he had been informed that the plaintiff had been injured. This fact is borne out by the testimony that the load which was involved at the time of the plaintiff's injury, had come into the hold and was lower than the three previous loads had been when they had tipped and spilled before the attempted repair [Tr. p. 37, lines 10-15]. This must lead to the conclusion that the blacksmith and the load itself had cleared the flange without any difficulty at the time of the accident.

There is no evidence of any kind that the flange again, at any time after it was hammered in, came out or protruded until it came out and immediately struck

the plaintiff. It could have been broken by the hammering or could have been hammered in in such a manner that it created a tension which caused it to spring loose either of its own accord or by the rubbing of the winch falls on the hatch coaming. In any event, *there was no indication of any kind to the Stevedore Company that the flange itself would come out and fall.* The Stevedore Company boss examined it after the hammering, there appeared to be no crack in it and it appeared to be safe.

There is no question but that the vessel was unseaworthy because of the flange, which either originally or by reason of the crew having worked on it, was placed in such a condition that it sprang or fell from its location. It may very well be, although this is denied by the Stevedore Company, that the shipowner was not guilty of negligence but, of course, unseaworthiness may exist without any negligence on the part of the shipowner.

However, with regard to the action of the shipowner against the Stevedore Company for indemnity, there must be some act on the part of the stevedore personnel which was not reasonable under the circumstances and there is no evidence thereof.

2. Did the Shipowner Breach Its Implied Contractual Obligations to the Stevedore Company and Were the Actions of the Shipowner Such as Would Preclude Recovery of Indemnity?

The shipowner may not recover indemnity for a breach by the stevedoring company of its obligations if the shipowner itself has been guilty of a material breach of the contract.

The basis for this doctrine is contained in the decision of the United States Supreme Court in the case of

Weyerhaeuser Steamship Company v. Nacirema Operating Company, 355 U.S. 563 at 567, where the Court states:

> "If in that regard respondent (Stevedore Company) rendered a substandard performance which lead to foreseeable liability of petitioner (shipowner), the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*" (emphasis and material in parentheses added).

This language was inferentially interpreted by United States Court of Appeals for the Second Circuit in 1962 as meaning that a material breach of the contract by the shipowner would preclude it from recovering indemnity for a breach by the stevedoring company, that Court stating on page 154 of its decision in *Pettus v. Grace Line v. Scaland Dock & Terminal Company,* 305 F. 2d 151:

> "To be sure, since the claim for indemnity is based on the stevedoring contract, a material breach of that contract by Grace Line would preclude its enforcing the contract to recover indemnity."

That this is the law in the Ninth Circuit appears to be confirmed by the case of *Hugev v. Dampks, etc.,* 170 F. Supp. 601 (affirmed 274 F. 2d 875), where the Court at page 608 sets out the position that the shipowner cannot recover if it has been guilty of a material breach of the contract. This is the ordinary contract law to the effect that one who seeks to recover damages for a breach of contract must prove that he himself has complied with his obligations thereunder. This has been recognized in the approved Jury Instructions set forth in 28 Federal Rules Decisions at pages 547-549.

It would appear certain that if there were ever a case in which the conduct of the shipowner was such as to preclude its recovery of indemnity from the stevedore company, the case at bar is it. We have, first of all, the fact that we are dealing solely with ship's equipment and there is no element, as there often is, of equipment being brought on board the vessel by the stevedore company. Further, we have the stevedore company halting its operations and specifically requesting the shipowner to rectify and correct the dangerous condition. The stevedore company certainly does not have either the obligation nor the right to make repairs to the ship. This is purely the responsibility of the shipowner. We then have the shipowner acting through the mate and the crew members undertaking to correct the situation presented by the defective ship's equipment. Even though both the ship's officer and the stevedore boss were apparently satisfied that the matter had been corrected and was safe, it seems patent it was not in fact safe. Since the dangerous condition was a part of the ship itself and the stevedore company had no right nor obligation to correct it, the stevedore company had only the obligation to stop work, draw it to the attention of the ship and not recommence work until it was apparently corrected.

The essence of this situation is that even though the ship's personnel may have attempted to take the necessary steps to correct the situation, the fact is that they did not correct it and such constitutes conduct on the part of the ship, which was in charge of the work of repair to its own equipment, that would preclude recovery of indemnity.

Conclusion.

It is respectfully urged that the third party judgment in favor of the shipowner Compania against the Stevedore Company, Crescent Wharf & Wharehouse Company, should be reversed for the reason that the shipowner did not meet its burden of proving:

1. That the Stevedore Company failed to do its work in a reasonably safe manner, and

2. That the shipowner was not guilty of conduct which would preclude its recovery of indemnity even if the Stevedore Company in fact did breach its contract.

Respectfully submitted,

SIKES, PINNEY AND MATTHEW,
By ROBERT SIKES,
Attorneys for Crescent Wharf & Warehouse Company, a corporation, Appellant-Third Party Defendant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT SIKES